

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

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4 ANDREW TETER and JAMES GRELL,) CIVIL NO. 19-00183 ACK-WRP
5 Plaintiffs,) Honolulu, Hawaii
6 vs.) April 28, 2020
7 CLARE E. CONNORS, in her) TELEPHONIC HEARING RE:
8 Official Capacity as the) PLAINTIFFS' MOTION FOR
9 Attorney General of the State) SUMMARY JUDGMENT [33] AND
of Hawaii, and AL CUMMINGS, in) DEFENDANTS' MOTION FOR
his Official Capacity as the) SUMMARY JUDGMENT [36]
10 State Sheriff Division)
Administrator,)
11 Defendants.)

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13 TRANSCRIPT OF PROCEEDINGS
14 BEFORE THE HONORABLE ALAN C. KAY
SENIOR UNITED STATES DISTRICT COURT JUDGE

15 APPEARANCES:

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25 (Continued)

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22 Official Court ANN B. MATSUMOTO, RPR
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24 Proceedings recorded by machine shorthand, transcript produced
25 with computer-aided transcription (CAT).

1 TUESDAY, APRIL 28, 2020

11:19 O'CLOCK A.M.

2 COURTROOM MANAGER: This is Civil Case No.

3 19-CV-00183 ACK-WRP, Teter, et al. versus Connors, et al.

4 This case is called for a motion hearing regarding
5 plaintiffs' motion for summary judgment and defendants' motion
6 for summary judgment.

7 Counsel, please state your names for the record.

8 Thank you.

9 MR. BECK: Alan Beck on behalf of the plaintiffs.

10 MR. AKAMINE: Good morning, Your Honor. Ryan Akamine
11 on behalf of defendants.

12 MR. STAMBOULIEH: And Stephen Stamboulieh on behalf
13 of the plaintiffs, Your Honor. Good morning.

14 THE COURT: Good morning.

15 I thought Ms. Hanakahi was present also.

16 MS. HANAKAHI: Yes. Wendy Hanakahi on behalf of
17 Everytown for Gun Safety.

18 THE COURT: Okay. And I understand that Mr. O'Grady
19 of the Firearms Coalition was called, but we haven't been able
20 to reach him. We left a message for him and he has not
21 responded, so we'll go ahead and proceed at this point.

22 And since plaintiffs filed their summary judgment
23 motion first, we'll proceed with the plaintiffs' case. And
24 please give me your name before you start so I know exactly who
25 is speaking.

1 MR. BECK: My name is Alan Beck, on behalf of the
2 plaintiffs, Your Honor. The matter before this Court today is
3 the constitutionality of Hawaii's ban on butterfly knives.
4 Both the plaintiffs in this matter challenge Hawaii's ban on
5 Second Amendment grounds. As an initial matter, butterfly
6 knives are protected by the Second Amendment.

7 We know this because in Heller, Heller stated that --
8 Heller -- the Second Amendment applies *prima facie* to all
9 bearable arms. This creates a rebuttal -- rebuttable
10 presumption of constitutionality to all arms that are bearable
11 on the person.

12 And in the case of knives, there are -- they're
13 explicitly noted, as an example in Heller, as a type of knife.
14 I --

15 THE COURT: Mr. Beck, I need to interrupt you for a
16 minute. I do want to say that I have a lot of road
17 construction going on right outside my house. So you'll all
18 have to bear with the difficulty in hearing on that.

19 But I want to ask you several questions first. And
20 my first question to you, Mr. Beck, is: If you would clarify
21 your Second Amendment challenge, whether it's limited to
22 subsection (a) of HRS 134-53; in other words, is it limited
23 just as a blanket ban and not clause (b), which prohibits the
24 use of butterfly knives in the commission of a crime?

25 MR. BECK: Yes, Your Honor. This is Alan Beck

1 speaking again.

2 we are solely challenging section (a), which
3 challenges -- our clients want to be able to own butterfly
4 knives for a variety of lawful purposes, both in the home and
5 outside the home. And we disavow any challenge to the section
6 that deals with challenging to having butterfly knives for use
7 in a crime, Your Honor.

8 THE COURT: Okay. So you're not challenging
9 subsection (b)?

10 MR. BECK: That is correct, Your Honor.

11 THE COURT: Okay. Thank you.

12 My next question is: You stated in your complaint
13 and your reply brief that your clients are bringing both an
14 as-applied and a facial challenge to the law. And most of your
15 argument hinges on the law being categorically or per se
16 unconstitutional. So that being the case, it would seem that
17 your challenge would have to be construed as a facial
18 challenge.

19 MR. BECK: I -- I don't see the practical difference
20 between our -- my plaintiffs' facial and my plaintiffs'
21 as-applied challenge.

22 However, based upon the -- I believe it's just the no
23 set of circumstances -- oh, we -- our clients are trying to
24 make clear that they both want the law struck as to everyone,
25 if possible, all other law-abiding citizens, if possible. But

1 in the event that this Court would find otherwise, they
2 additionally want the law as applied to them specifically as
3 law-abiding persons that have -- that don't have any history of
4 mental illness, etc.

5 (The court reporter requested clarification and the
6 record was read.)

7 THE COURT: Yes, we're getting an echo.

8 MR. BECK: My apologies, Your Honor. Let me start
9 over on that section.

10 The thrust of my plaintiffs' complaint is to strike
11 the law as to all other -- as for them and other similarly
12 situated law-abiding persons. But if this Court finds that
13 relief -- is unwilling to grant that relief, the as-applied
14 challenge is there so the law will be struck at the very least
15 as applied to the individual client -- plaintiffs.

16 THE COURT: Well, what's the standing as far as an
17 as-applied challenge? There have been no charges against your
18 clients.

19 MR. BECK: That is correct, Your Honor. Our -- my
20 plaintiffs' claim to standing is solely because they would like
21 to purchase butterfly knives for use in -- for a variety of
22 lawful purposes, and but for the law, they are -- they are
23 unable to do so. And so -- and to the extent that the
24 complaint should be construed as an as-applied challenge, it
25 was done so in order to -- to ensure that -- that this Court

1 understands that was -- that the relief we're seeking is to
2 simply persons such as my plaintiffs, law-abiding individuals
3 without a history of mental illness, etc., Your Honor.

4 THE COURT: Well, aren't you simply making a facial
5 challenge then?

6 MR. BECK: That's -- that's -- well, that's correct,
7 Your Honor. I --

8 THE COURT: Well, then, so I understand you're saying
9 you're only making a facial challenge and not an as-applied
10 challenge?

11 MR. BECK: What -- yes, Your Honor. However, I do
12 stress that we are not attempting to strike the law as applied
13 to people with a history of mental illness or felonies or
14 anything along that lines.

15 Our intent by stating that we were making an
16 as-applied challenge is to demonstrate that we wish Hawaii's
17 ban on butterfly knives to be struck as to persons such -- to
18 my plaintiffs and individuals are similarly situated to -- my
19 plaintiffs are law-abiding.

20 And so I'm just -- I'm very hesitant to completely
21 disavow the statement that we're making as -- that challenge,
22 as-applied challenge, because I don't want the Court to believe
23 that we're challenging the law on behalf of individuals that
24 might be otherwise prohibited due to a history of crime or
25 mental illness, Your Honor.

1 THE COURT: So what's the answer to my question?

2 MR. BECK: We are making a facial challenge, Your
3 Honor.

4 THE COURT: Pardon me?

5 MR. BECK: We are making a -- plaintiffs are
6 making -- my plaintiffs are making a facial challenge, Your
7 Honor.

8 THE COURT: Okay. Only a facial challenge and not an
9 as-applied challenge; is that right?

10 MR. BECK: Yes, Your Honor.

11 THE COURT: Thank you.

12 Now, another question. You argue that a categorical
13 ban of butterfly knives should be analyzed in the same way as
14 Heller's complete ban on handguns.

15 Now, why would that approach essentially eliminate
16 Heller's focus on handguns as a quintessential self-defense
17 weapon of choice?

18 MR. BECK: I -- Your Honor, I believe that Heller
19 should be properly construed to find that -- that it found
20 that -- that handguns, because handguns are quintessential
21 self-defense arms, they receive a -- a great deal of cause to
22 protection.

23 Heller wasn't -- I don't believe Heller was ruling
24 that it was finding that that -- it was somehow placing
25 handguns in that role. It was the fact that -- it just simply

1 is a matter of fact that handguns are quintessential
2 self-defense arms in the United States. And because of that
3 preexisting fact, the Court was going to grant -- give it a --
4 the largest amount of constitutional scrutiny possible.

5 So similarly, knives are quintessential self-defense
6 arms. They are the most commonly owned arm in the United
7 States. Every home owns at least one arm -- one knife. So
8 because they're so commonly possessed for lawful purposes and
9 in the same manner as a handgun, if not more so, Heller's same
10 reasoning should be applied to knives, Your Honor.

11 THE COURT: Yeah, well, we're not talking about any
12 knives. We're talking about a specific knife.

13 MR. BECK: Well, yes, Your Honor, I understand that.
14 But in Heller, the matter before the Court -- the litigants,
15 the -- the firearm that was possessed, the handgun that was
16 possessed by Dick Heller was an eight-round revolver, a
17 .22-caliber buttland (phonetic) -- Highland. That was in our
18 briefing. And yet the Court did not rule on whether that
19 particular model of handgun was typically possessed. It just
20 simply found that as a class handguns are protected and did not
21 analyze whether -- what had to occur for a particular type of
22 handgun be protected.

23 So we know from Heller it's a more generalized
24 analysis as to a particular class of arms. Similarly,
25 butterfly knives are a type of knife. And it's not that knives

1 as a class are typically used for lawful purposes as the record
2 indicates, Your Honor.

3 THE COURT: Well, you know, one of the state's
4 strongest cases is State versus Murillo. That's M-U-R-I-L-L-O.
5 And your briefing just barely addressed that case. In fact,
6 all you say about it is that you don't concede its reasoning.
7 That's all you say about Murillo.

8 MR. BECK: I -- yes, Your Honor. State v. Murillo
9 is -- is the case out of New Mexico. And we discuss it in
10 our -- our response as part of our discussion of the Wisconsin
11 case. And the Wisconsin case was able to both distinguish and
12 demonstrate that Murillo's reasoning is faulty.

13 The -- the court in Murillo, as a preliminary matter,
14 it is on the behalf of a criminal defendant and -- who was
15 found in a fight at a Walmart, outside his home. And so just
16 simply the fact that he was making a challenge outside of
17 the -- outside of the home impacts allegation of criminal
18 misconduct.

19 Secondly -- and this is on page 13 to 14 is where
20 we -- they -- as we just discussed, the -- Murillo finds that
21 knives are -- are peripheral arms to the Second Amendment. And
22 as I just discussed, that is just simply not the case. Knives
23 are commonly owned in most homes for a variety of lawful
24 purposes.

25 And as the Wisconsin court stated, the defendant

1 Murillo did not raise the Second Amendment challenge of the
2 trial court, therefore it deprived the state of opportunity to
3 make an evidentiary showing that the challenged statute
4 withheld -- withheld intermediate scrutiny.

5 In Murillo, the litigant raised his challenge up on
6 appeal, and there was no fact-based -- there was no opportunity
7 for discovery. The -- or any of the other things the trial
8 courts afforded.

9 Furthermore, Murillo deals with switchblades. The
10 matter before this Court is a butterfly knife. And to the
11 extent much of what Murillo -- Murillo found that that
12 particular knife, the switchblade, is typically used by
13 individuals for unlawful purposes. And additionally, there's a
14 rationale to -- there's a public safety issue, because these
15 knives can open quicker.

16 Even if we take Murillo at face value, which we
17 should not, the butterfly knife is highly distinguishable from
18 switchblades. First off, our expert has demonstrated that
19 butterfly knives are -- open slower than standard pocket
20 knives. And --

21 THE COURT: Yeah, maybe -- maybe by a second or two.

22 MR. BECK: Yes, Your Honor. I -- I mean, with --
23 within the confines of the -- of the argument, though, I mean
24 they're significantly -- switchblades, at least the Murillo
25 court found, we all concede that the Murillo court found that

1 switchblades are faster than standard knives. And we've been
2 able to demonstrate that, you know, even if it's by a second or
3 two butterfly knives are not. So there's any -- yeah, that
4 rationale is out -- out with now.

5 And secondly, Your Honor, both our evidence and
6 frankly much of the state's have demonstrated that unlike the
7 switchblade in Murillo, the -- butterfly knives are not weapons
8 used by criminals, typically. They are weapons that are
9 typically used for lawful purposes, for martial arts training,
10 for -- for self-defense, for just all sorts of stuff. I -- in
11 fact, you know, just as a generalized utility knife. In fact,
12 you know -- go ahead, Your Honor.

13 THE COURT: In Murillo, the court found that the
14 statute could be considered as banning an entire class of arms,
15 which were switchblades, as you mentioned. But that then it
16 said it could also be considered as a ban on a mere subset of a
17 type of arms, namely knives, that is itself a mere peripheral
18 self-defense security.

19 And then the court went on and said the real issue
20 is, number one, the degree of burden placed on a right to keep
21 and bear arms, which it found the switchblade was an
22 unsubstantial burden; and number two, the distance from the
23 core of the right, which the court there found was remote.

24 MR. BECK: Yes.

25 THE COURT: How do you -- you know, you say the

1 Wisconsin court disagrees. But doesn't Murillo make a pretty
2 sound argument?

3 MR. BECK: Well, we as a -- just a preliminary
4 matter, the -- the part where the Murillo court finds that
5 knives are a peripheral arm is just simply untrue. Relying
6 both upon our arguments and the arguments of the Hawaii Defense
7 Foundation's amicus brief, knives are a standard portion of --
8 a standard self-defense tool. And they are -- you know, it's
9 just a --

10 THE COURT: Yeah, but I think -- I think there
11 they're talking about knives in general. They're not talking
12 about butterfly knives.

13 MR. BECK: Well, I -- I would rely back on my prior
14 argument that we know from Heller that the -- that knives, that
15 the analysis in Heller did not rely upon what type of handgun
16 that the -- that Dick Heller wished to register.

17 In fact, the handgun he wanted to register is a very
18 unusual one, an eight-round .22-caliber revolver. Yet that
19 was -- there was no mention of that in the Heller opinion. Not
20 once in Heller does it refer to making analysis towards the
21 type of handgun and whether or not that particular type of
22 handgun is a -- is in common use or is typically used for
23 lawful self-defense.

24 So to the extent that Murillo relied upon that
25 proposition, then it just could be it contradicted Heller,

1 which, of course, this Court needs to abide by, Your Honor.

2 THE COURT: Well, you know, actually, in Heller as
3 well as the Ninth Circuit in Jackson ruled that regulations
4 which leave open alternative channels for self-defense are less
5 likely to place the severe burden on the Second Amendment right
6 than those that do not.

7 MR. BECK: Yes, Your Honor. Let me address Jackson.

8 In Jackson, the court in Jackson, the Ninth Circuit in Jackson
9 was dealing with a ban on the sale of hollow-point ammunition,
10 and it expressly states in -- that it was applying intermediate
11 scrutiny to that ban because -- for two reasons, Your Honor.

12 First, a person living in San Francisco that wished
13 to own hollow-point ammunition could simply go to -- right
14 across the county line, and, you know, San Francisco County is
15 not a big place to begin with, and head over to -- and buy
16 hollow-point ammunition at any of the gun stores in the
17 neighboring counties, such as Alameda.

18 And secondly, in Jackson, the Ninth Circuit found
19 that -- was dealing with a ban on a sale that expressly
20 disavowed dealing with -- you know, they strongly implied that
21 if it was dealing with a ban of possession that a high-level
22 scrutiny would apply in this matter.

23 Here, Mr. -- or my plaintiffs, the plaintiffs'
24 challenge is distinguishable from Jackson for a number of
25 reasons. It -- you know, it's just simply a complete ban on

1 possession. So there's no avenue for the -- for the plaintiffs
2 to own a butterfly knife in any shape, way, or form.

3 So Jackson in fact supports the application of a
4 higher level of scrutiny than the one that was -- than the
5 intermediate scrutiny that it applied in dealing with that ban
6 on mere sales.

7 THE COURT: Of course, Jackson was taking that
8 statement from Heller.

9 Another question I have is: Are you challenging HRS
10 134-53 just as to a ban on possessing a butterfly knife in your
11 home, or are you challenging the entire statute?

12 MR. BECK: We are -- we are challenging it in the
13 home, Your Honor. If -- and separately -- well, we are -- we
14 would like to carry it, but we are -- we're making two separate
15 challenges, both -- both in the home and the carrying, Your
16 Honor. But our position is if -- a complete ban outside the
17 home is unconstitutional, as well as the ban inside the home.
18 And there might be reasonable time, place, and manner
19 restrictions that --

20 THE COURT: Well, didn't the Ninth Circuit rule
21 against you in Peruta on that? En banc?

22 MR. BECK: No, Your Honor. In Peruta, the Ninth
23 Circuit ruled in -- that there's no free-standing right to
24 concealed carry. Thus --

25 THE COURT: Right.

1 MR. BECK: -- the -- I (indiscernible) --

2 THE COURT: But there's been no ruling, has there, as
3 far as the right to carry openly, correct?

4 MR. BECK: I -- well, there was a ruling in Young v.
5 State of Hawaii. And that -- that -- the Ninth Circuit found
6 from a three-judge panel that you have a constitutional right
7 to openly carry outside the home. However, that opinion was --
8 was taken en banc, and Yagger's (phonetic) -- currently --
9 we're waiting for oral arguments at the en banc court, Your
10 Honor.

11 THE COURT: I see. Okay.

12 So your position then, I take it, is you're
13 challenging both the right to possess a butterfly knife in your
14 home, as well as the right to carry it openly in public?

15 MR. BECK: Yes, Your Honor.

16 THE COURT: Hello?

17 MR. BECK: I am here, Your Honor.

18 THE COURT: Okay. I thought maybe I had been cut
19 off.

20 COURTROOM MANAGER: Judge?

21 THE COURT: Pardon me?

22 COURTROOM MANAGER: Hi, Judge, it looks like
23 Mr. O'Grady dialed in.

24 Is that you, Mr. O'Grady?

25 MR. O'GRADY: Yes, ma'am.

1 COURTROOM MANAGER: Okay, thank you very much, sir.

2 THE COURT: Another question for you, Mr. Beck.

3 Heller limits the Second Amendment right to apply to weapons in
4 common use for lawful purposes. So what's your understanding
5 of the scope of their test, and what is your best evidence that
6 butterfly knives are the type of arms that were in common use?

7 MR. BECK: I believe that this -- that the best
8 understanding of that test is -- and this is based to a large
9 degree on circuit precedent that is -- that there -- initial
10 matter, there is a rebuttable presumption of -- that all
11 bearable arms are protected by the Second Amendment.

12 And the burden -- this portion is made by Heller.

13 And this is the precedent of the Second Circuit as well, that's
14 adopted, I believe Heller's position to be, where there's a
15 rebuttable presumption that a bearable arm is protected.

16 So once you establish --

17 THE COURT: I'm sorry. I wasn't able to understand
18 the last couple of words.

19 MR. BECK: My apologies, Your Honor.

20 The Heller and -- based upon Heller, the Second
21 Circuit has found that there's a rebuttable presumption that
22 all bearable arms are protected by the Second Amendment. Thus,
23 once you establish that something is an arm, the burden shifts
24 to the government to demonstrate that it is not protected. And
25 this we know -- the following we know, from circuit precedent,

1 is that it -- you simply need to -- that the -- it's not really
2 a numerical analysis per se; it's really a finding that the
3 typical use of a -- of an arm is for lawful purposes. And
4 that's the best way to interpret the common use language,
5 commonly used for lawful purposes.

6 So rather than a numerical -- some sort of numerical
7 finding as, you know, a million arms of this particular type,
8 we look of the set of arms that are possessed, are these
9 weapons are typically used for -- for -- lawfully, or are these
10 arms like in an unpublished case, the Ninth Circuit discussed
11 regarding explosives, weapons that typically would be used and
12 possessed for unlawful purposes, Your Honor. And --

13 THE COURT: What was the name of the Second Circuit
14 case?

15 MR. BECK: The Second Circuit case? That's New York
16 Rifle & Pistol. Let me -- yeah, let me --

17 THE COURT: The Supreme Court --

18 MR. BECK: I'm sorry. New York State --

19 THE COURT: The Supreme Court just punted on that.

20 MR. BECK: No, no, no. I'm sorry, Your Honor. I --
21 New York State Rifle & Pistol Association v. Cuomo. New
22 York's -- there's a couple ones with that plaintiff. And this
23 was New York State Rifle & Pistol Association v. Cuomo, at 804
24 F.3d 24D -- 242, 2-d -- Second Circuit 2015. And that case is
25 in our briefing, Your Honor.

1 The one that the -- and that dealt with the
2 constitutionality of the New York State's ban on -- on certain
3 types of rifles and high-capacity magazines as -- of course,
4 the one the Supreme Court just punted on was -- dealt with the
5 transport law out of New York City.

6 THE COURT: All right. All right.

7 Another question I just wanted to ask you before you
8 proceed with your opening, and that is: would invalidating the
9 butterfly knife statute in Hawaii -- what's your position as to
10 a state ban on switchblades, that statute?

11 MR. BECK: You know, I -- my plaintiffs are trying to
12 get a butterfly knife. And throughout the course of this, you
13 know, the discovery and all the evidentiary issues that have
14 been dealt with in this case have dealt with the history of the
15 butterfly knife. And the record hasn't been -- hasn't been
16 produced on switchblades.

17 what I would say is our position is that butterfly
18 knives are, you know, commonly owned for lawful purposes.
19 Assuming without conceding that a switchblade is not owned for
20 lawful purposes, then, of course, a favorable ruling on
21 butterfly knives would not impact the constitutionality of
22 Hawaii's switchblade ban, Your Honor.

23 THE COURT: Well, okay, thank you.

24 what else would you like to say in presenting your
25 arguments?

1 MR. BECK: Yes, Your Honor. Thank you, Your Honor.

2 The bottom line here is the state has not produced
3 any evidence that Hawaii's ban on butterfly knives actually
4 promotes any sort of public safety interest. And under any
5 level of scrutiny that this Court would apply, the -- the state
6 needs to present a -- a strong government interest that's
7 supported by -- that's supported by actual evidence that -- you
8 know, that butterfly -- that banning butterfly knives actually
9 produces the result that they want. And it's --

10 THE COURT: Well, you want me to ignore the testimony
11 of the Honolulu police officers?

12 MR. BECK: Well, the -- the deposition of Officer
13 Nagamine just does not -- they -- he has not -- he didn't
14 demonstrate in any shape, way, or form how butterfly knives --
15 how the ban on butterfly knives actually promotes public
16 safety. I mean, he conceded that these arms are less deadly
17 than -- than handguns, for example, and he didn't offer any
18 testimony as to --

19 THE COURT: I don't think -- I don't think anyone
20 disagrees with that.

21 MR. BECK: Well, yes, Your Honor, but as just simply
22 a matter of law, if a handgun is -- cannot be banned, how can
23 we -- it doesn't seem to make -- there seems not to be a
24 government interest to ban an arm that is less deadly.

25 And the bottom line is --

1 THE COURT: Assuming --

2 MR. BECK: -- the state does not --

3 THE COURT: Assuming it's used for a lawful purpose
4 commonly.

5 MR. BECK: Yes. It's -- but again, I rely on the
6 Second -- both Heller and the Second Circuit to argue that
7 again the burden was on the state to demonstrate that the
8 typical use of the butterfly knife is unlawful. There's a --
9 the presumption is an arm is for lawful use, and it would have
10 been -- the onus would have been on the -- on the state to
11 demonstrate that these are typically arms used for something
12 other than lawful purposes.

13 In fact, a lot of the -- the evidence that the state
14 submitted to its -- its moving papers actually supports the
15 proposition that butterfly knives are typically used for -- I'm
16 sorry. I thought you were about to raise something.

17 But that butterfly knives are typically arms used
18 for -- for martial arts endeavors and self-defense and other
19 lawful purposes. They have -- the state has failed to present
20 evidence that shows that these arms are -- typical use is for
21 unlawful purposes. So -- and additionally, both the expert
22 report that was submitted by the -- by us also speaks about
23 the -- about the traditional use of butterfly knives being for
24 lawful purposes, Your Honor.

25 So -- and even using the -- the state's best case as

1 paraphrased, this Court, even that court used intermediate
2 scrutiny. And as I had previously mentioned, the burden was on
3 the state to both demonstrate that butterfly knives are --
4 typical usage is something other than lawful and that there's
5 actually a government interest here in -- that's supported by
6 evidence and is properly tailored to curbing that interest.
7 And yet the record is devoid of that, Your Honor.

8 In fact, as far as -- the butterfly knives, as far as
9 we can tell, is -- I mean, it's just been banned primarily
10 because it's -- for aesthetics, beyond anything else.

11 So --

12 THE COURT: Thank you. Did you have anything else
13 you wanted to say? It's just that we've been going almost an
14 hour now.

15 MR. BECK: Yeah, I --

16 THE COURT: You've taken up most of your time.

17 MR. BECK: Yes, Your Honor. I would appreciate a
18 rebuttal to Mr. Akamine's argument. But I -- I'd like to thank
19 the Court for all its time so far.

20 THE COURT: Okay. Thank you.

21 MR. BECK: Thank you, Judge Kay.

22 THE COURT: So Mr. Akamine now.

23 MR. AKAMINE: Yes, Your Honor. This is Ryan Akamine.
24 We filed a summary judgment motion as well requesting
25 that the Court find the statute constitutional. We viewed the

1 plaintiffs' claim as a facial challenge and agree with the
2 Court's looking at Murillo as well as looking at the
3 legislative history in this case for testimony establishing the
4 important state interests in banning butterfly knives.

5 THE COURT: Okay. I have a couple of questions I
6 want to ask you too.

7 MR. AKAMINE: Sure.

8 THE COURT: The first one is: Do you concede that
9 butterfly knives are bearable arms under the Second Amendment?

10 MR. AKAMINE: No. One of our arguments is that it's
11 dangerous and unusual, so I don't think we will concede on --
12 on that, that it's bearable arms.

13 THE COURT: I'm sorry. What? You said something and
14 unusual? I didn't hear you.

15 MR. AKAMINE: Yes. So one of our arguments, our
16 initial argument is that the butterfly knife is a dangerous and
17 unusual weapon. Therefore, we do not believe it fits within
18 the Second Amendment, you know, protections of bearable arms.

19 THE COURT: Well, can you identify any post-Heller
20 Second Amendment cases holding that knives are dangerous and
21 unusual weapons for which prohibitions are presumptively lawful
22 under Heller?

23 MR. AKAMINE: No, I cannot.

24 THE COURT: Can you identify any post-Heller Ninth
25 Circuit cases upholding the blanket ban on a type of weapon?

1 MR. AKAMINE: On a type of weapon?

2 THE COURT: Yes. Go ahead.

3 MR. AKAMINE: Not -- if we're looking at knives as a
4 type of weapon, no. But a ban such as Murillo for switchblades
5 as a subset of a type of weapon -- excuse me, yeah, type -- as
6 a subset of a type of knives.

7 THE COURT: Yeah, all right. I concur that Murillo
8 seems to be one of your stronger cases.

9 Now, why is this blanket ban different from the
10 blanket ban in Heller and the most subsequent cases finding
11 that such bans do not pass muster under any level of scrutiny?

12 MR. AKAMINE: This case involves butterfly knives,
13 Your Honor, for which the Hawaii legislature took in testimony
14 determining whether or not they should or should not have a ban
15 on this subset of knives. And the legislature found, after
16 hearing testimony both for and against the ban on
17 switchblades -- I mean, excuse me -- on butterfly knives,
18 believed that butterfly knives were typically used by gang
19 members and intimidating. They were easy to conceal and
20 intimidating when brandished.

21 And so they found that these types of weapons were
22 used by those for offensive criminal purposes and chose to ban
23 them. This is not unlike something that plaintiffs' expert
24 mentioned, where he said -- he told a story about his -- his
25 sister or someone coming to the rescue of him when he was

1 confronted by some bullies and whipped out that butterfly
2 knife, and the brandishing of the knife itself was enough to
3 scare away the bullies.

4 So these -- that's what -- that's similar to what the
5 legislature found when it took in testimony by HPD.

6 THE COURT: You know, I have trouble with this
7 argument about a butterfly knife being more concealable than
8 other knives. Seems to me just about any knife that's -- you
9 know, a pocketknife or of that nature, or switchblade knife,
10 butterfly knife, they're all very concealable, aren't they?
11 Equally concealable?

12 MR. AKAMINE: I would say if the size of the knife is
13 similar, that is true. I think the concealable argument was
14 just one part of the argument for the legislature to consider
15 because they considered not only the concealable nature of it,
16 but who was using it and the ease of the use.

17 THE COURT: What's your evidence that butterfly
18 knives are unusual?

19 MR. AKAMINE: Well --

20 THE COURT: In other words, that they're not
21 typically used by law-abiding citizens for lawful purposes.

22 MR. AKAMINE: Right. So we've -- just from the
23 testimony that was received, Your Honor, I think that
24 there's -- you know, the legislature took in testimony both for
25 and against, took in testimony by the Pedoy School of Martial

1 Arts, as well as from the prosecutor's office, public
2 defender's office and HPD. And just from that testimony, that
3 the HPD and prosecutor's office found it being used for the
4 most part by those not law-abiding citizens, that's the
5 testimony that we have.

6 THE COURT: Now, in your opposition to plaintiffs'
7 motion, you really didn't address whether the law would pass
8 muster under strict scrutiny. Do you concede that it would
9 not?

10 MR. AKAMINE: No, I don't think we would concede that
11 at all, Your Honor. I think that -- that the intermediate
12 scrutiny is the proper constitutional review. But we also
13 argue that it's dangerous and unusual in that sense as well and
14 isn't a bearable arm. But in terms of it being subject to
15 strict scrutiny, I don't think any of the courts have utilized
16 that particular review for this type of case.

17 THE COURT: You know, under Heller, how do you defend
18 a ban on possession in your own home of a butterfly knife which
19 can be used for self-defense?

20 MR. AKAMINE: Well, I think, first of all, it's -- as
21 I said earlier, one of -- our initial argument is that it's a
22 dangerous and unusual weapon, not typically used by law-abiding
23 citizens, and therefore not subject to Second Amendment
24 protection. That goes for in the home as well. And it is a
25 typically -- well, the legislature found that it was being used

1 for offensive purposes as well, and not for defensive purposes.

2 THE COURT: Okay. Those were the questions I wanted
3 to ask you initially. So please proceed with your
4 presentation.

5 MR. AKAMINE: Your Honor, as I mentioned, our first
6 argument is that butterfly knives are dangerous and unusual and
7 are not subject to the protections of the Second Amendment.

8 Alternatively, other types of weapons have been
9 subjected by courts, including the Ninth Circuit, to
10 constitutional scrutiny under the intermediate scrutiny test.
11 And under that test the law provides and asks similar to what
12 Murillo did in that case, was whether the challenged law
13 burdens conduct protected by the Second Amendment and, if it
14 does, to apply the level of scrutiny.

15 And in this case, applying intermediate scrutiny, we
16 have to look at whether the government's stated objective is
17 significant, substantial, or important, then secondly, whether
18 there's a reasonable fit between the challenged regulation and
19 the asserted objective.

20 Here, Your Honor, the objective of the legislature
21 was the safety of the public after having found or having taken
22 in testimony by those for and against the ban on butterfly
23 knives.

24 And the legislature, the way they looked at it was
25 initially it believed that the butterfly knives fell within the

1 switchblade statute, the same statute mentioned -- Your Honor
2 mentioned earlier.

3 But the In re, in the Interest of Doe case, where the
4 court found that the opening of the butterfly knife wasn't by
5 inertia and gravity and found that that didn't apply. So the
6 legislature specifically went back and said, okay, so we now
7 understand that the court is interpreting our switchblade
8 statute as not applying to butterfly knives, but we -- we want
9 to look at butterfly knives and -- and fashion a statute that
10 applies to that.

11 So in doing so, they took in testimony. They found
12 that butterfly knives were being used by those with criminal
13 intent, gangs and other people, and then decided to -- to enact
14 the statute.

15 And that statute was specifically to address the
16 important public interest of safety. And by banning a specific
17 subset of knives, particularly this butterfly knife, they were
18 able to then say, yes, these butterfly knives are banned in the
19 same way that switchblades are.

20 And I think in light of that reasoning, Your Honor,
21 the legislature met the intermediate scrutiny test and this
22 butterfly knife statute should be upheld as constitutional.

23 I think that the testimony provided at the time,
24 provided to the legislature at the time the statute was enacted
25 is sufficient evidence to show the important government

1 interests and the specific fit of the statute.

2 We believe that the same reasoning stated in Murillo
3 should apply to this case, and the statute should be found
4 constitutional. That's all I have, Your Honor.

5 THE COURT: Okay. Thank you very much.

6 And then before we go back to Mr. Beck, I want to ask
7 either of the -- well, first off, I'll ask Ms. Hanakahi if you
8 have anything you want to say.

9 MS. HANAKAHI: This is Wendy Hanakahi. No, Your
10 Honor, I don't have any -- any argument or comments.

11 THE COURT: Okay. Thank you.

12 And Mr. O'Grady, did you have anything you wanted to
13 say?

14 MR. O'GRADY: No, Your Honor. Thank you.

15 THE COURT: Thank you.

16 And back to you, Mr. Beck, do you want to say
17 something more?

18 MR. BECK: Yes, Your Honor. Sorry, I was -- had my
19 phone on mute.

20 Just the --

21 THE COURT: I'm getting a real echo from you now.

22 MR. BECK: My apologies, Your Honor. Can you hear me
23 better now, Your Honor?

24 THE COURT: Yes. Thank you.

25 MR. BECK: As a preliminary matter, the state's

1 position that butterfly knives are dangerous and unusual is
2 foreclosed by Ninth Circuit precedent in United States v.
3 Henry.

4 In Henry --

5 THE COURT: Sorry -- I'm sorry. Ninth Circuit case
6 in -- what's the name of the case?

7 MR. BECK: United States v. Henry, Your Honor.

8 And that is cited to in our briefs.

9 In Henry, the -- the Ninth Circuit, while ruling on
10 the constitutionality of the federal machine gun ban, found
11 that -- that -- that machine guns are particularly dangerous,
12 and they looked at whether -- at the fact that machine guns are
13 much, much more dangerous than typical arms, and found that the
14 dangerous prong was fulfilled by that. And here, the state by
15 its expert has conceded that knives are less dangerous than a
16 handgun.

17 So based upon Ninth Circuit precedent, the argument
18 that knife -- that butterfly knives are dangerous, unusual has
19 been foreclosed by -- by their position that knives are less
20 dangerous than handguns.

21 And the -- so with that, we have to move to the --
22 the constitutional -- under any level of scrutiny, this ban,
23 the state has not demonstrated that there's actually a -- that
24 there's actually any type of public safety benefit to a
25 complete -- to their ban on butterfly knives.

1 And now on simply the typical scrutiny analysis being
2 enough to demonstrate that, there also is a --
3 under-inclusivity argument, which also supports this position.
4 And here under-inclusivity applies because, as state's counsel
5 has just conceded, there -- other knives are just as
6 concealable. And as are -- as some of the studies we cite to,
7 there are many types of knives that are much more dangerous
8 than a -- than a butterfly knife.

9 For example, we cite to a study that shows that a --
10 that a butcher knife is -- is roughly twice as likely to be --
11 to result in death. Injury from a butcher knife is about -- is
12 twice likely to end in death as a switchblade, which the state
13 seems to take the position is about as dangerous as a cutting
14 instrument as a butterfly knife.

15 THE COURT: I'm sorry --

16 MR. BECK: So the fact that --

17 THE COURT: If I can interrupt you, you mentioned the
18 butterfly and the switchblade knife. You were referring to
19 another type of knife, and I didn't hear what you said.

20 MR. BECK: A butcher knife, Your Honor.

21 THE COURT: Oh.

22 MR. BECK: Yeah. Yes, Your Honor. One of our
23 studies says --

24 THE COURT: You're not -- you've got machetes in
25 there too. They're not quite as feasible, are they?

1 MR. BECK: I will concede that, Your Honor. Yeah --

2 THE COURT: All right.

3 MR. BECK: Yes, Your Honor. But --

4 THE COURT: Getting pretty far afield.

5 MR. BECK: Yes, I mean, I -- unless this Court -- I
6 think I've laid out my position here, Your Honor. And so I
7 would be happy to answer any other questions that the Court may
8 have. However -- and -- but if the Court does not have any
9 other questions, I -- I would like to submit, Your Honor.

10 THE COURT: Okay. Thank you.

11 And Mr. Akamine, did you have anything more you
12 wanted to say?

13 MR. AKAMINE: No, Your Honor, I don't.

14 THE COURT: Okay. Well, thank you, all. I'm going
15 to take this under submission to give it further thought. And
16 I will issue a written decision. So thank you, and have a good
17 day and stay safe. Good-bye.

18 MR. AKAMINE: Thank you, Your Honor.

19 MR. BECK: Thank you, Your Honor.

20 MR. O'GRADY: Thanks, Your Honor.

21 MS. HANAKAHI: Thank you, Your Honor.

22 (The proceedings concluded at 12:23 p.m., April 28,
23 2020.)

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COURT REPORTER'S CERTIFICATE

2 I, Ann B. Matsumoto, Official Court Reporter, United
3 States District Court, District of Hawaii, do hereby certify
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DATED at Honolulu, Hawaii, June 2, 2020.

/s/ Ann B. Matsumoto
ANN B. MATSUMOTO, RPR

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